

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA TRANSPORTATION REGULATION BOARD

In the Matter of the Petition
of Annette Brosh, d/b/a Brosh
Transportation, Lowry, MN for
Extension of Charter Carrier
Permit Authority to Transport
Passengers under Charter from
Points Located in Beltrami
County to All Points in
Minnesota, and Return.

FINDINGS_OF_FACT,
CONCLUSIONS,
RECOMMENDATION
AND MEMORANDUM

The above-entitled matter came on for hearing before Allan W. Klein,
Administrative Law Judge, on July 11, 1991, in South St. Paul, Minnesota.

Appearing on behalf of the Petitioner, Annette Brosh, d/b/a Brosh
Transportation, was Annette Brosh and her son, David Brosh, Brosh
Transportation, Highway 55, Lowry, Minnesota 56349. Appearing on behalf of
Protestants Red River Trails, Inc., Lange Transport, Triangle Transportation
Co., Inc. and Riggles Transport was Gene P. Johnson, P.O. Box 2471, 709 Black
Building, 118 Broadway, Fargo, North Dakota 58108.

During the hearing, Protestants moved to dismiss the proceeding and deny
the Petition. The Motion was granted. The record closed at that time on
July 11.

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, and the
Rules of Practice of the Public Utilities Commission, as applicable to the
Transportation Regulation Board, and the Rules of the Office of
Administrative
Hearings, exceptions to this Report, if any, by any party adversely affected
must be filed within 20 days of the mailing date hereof with the
Transportation
Regulation Board, Minnesota Administrative Truck Center, 254 Livestock
Exchange
Building, 100 Stockyards Road, South St. Paul, Minnesota 55075. Exceptions
must be specific and stated and numbered separately. Proposed Findings of
Fact, Conclusions and Order should be included, and copies thereof shall be
served upon all parties. If desired, a reply to exceptions may be filed and
served within ten days after the service of the exceptions to which reply is
made. Oral argument before a majority of the Board may be permitted to all
parties adversely affected by the Administrative Law Judge's recommendation
who
request such argument. Such request must accompany the filed exceptions or

reply, and an original and five copies of each document must be filed with the Board.

The Minnesota Transportation Regulation Board will make the final determination of the matter after the expiration of the period for filing exceptions as set forth above, or after oral argument, if such is requested and had in the matter.

Further notice is hereby given that the Board may, at its own discretion, accept or reject the Administrative Law Judge's recommendation and that said recommendation has no legal effect unless expressly adopted by the Board as its final Order.

STATEMENT OF ISSUE

Did Petitioner fail to meet its burden of proof to demonstrate a need for the transportation services requested in the Petition so as to justify the granting of a Motion to dismiss the proceeding and deny the Petition?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Annette C. Brosh, d/b/a Brosh Transportation, is a sole proprietor operating school buses and passenger buses under charter. Stanley M. Brosh, her husband, operated the business from sometime in the 1960s. In 1983, charter authority was transferred from Stanley Brosh to Annette Brosh. MPUC Docket No. CH 28351,49605/T-83-119, Ex_Parte_Order issued March 29, 1983.

2. Brosh Transportation is headquartered in

3. Brosh owns six Prevost LeMirage coaches, with capacities ranging between 46 and 49 passengers, as well as two Diamond VIP lift-equipped coaches, with capacities of 18 and 24 passengers.

4. Annette Brosh does not have any long term debt outstanding in connection with her transportation business. All of her coaches, facilities and real estate used in the business are fully paid for.

5. On April 12, 1991, Brosh filed a Petition for extension of her charter carrier permit authority with the Minnesota Department of Transportation. The Petition was duly forwarded to the Transportation Regulation Board on April 17. The Petition seeks an extension of authority to allow transportation of passengers under charter from points located in Beltrami County to all points in Minnesota and return.

6. The Board published notice of the Petition in its calendar of

April«26, 1991, setting a protest date for May 16, 1991. Timely Protests were received from Lange Transport, Inc. and Red River Trails, Inc., as well as from Merchants Transfer & Storage, Inc., d/b/a Bemidji Bus Lines (Wilkins & Winge). A Protest was also received from Riggles Transport, but it was not received until May 20, and there was some question as to its timeliness. That question was never resolved, as Riggles' subsequent Petition to Intervene was granted.

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7. On June 7, 1991, the Board issued its Notice of Public Hearing, setting a hearing in this matter for July 9 in South St. Paul. The Notice was published in the June 7 calendar and weekly thereafter.

8. Following a prehearing conference telephone call on June 19, the Administrative Law Judge continued the hearing for two days, to begin on July«11. During that conference call, it was also determined that Brosh planned on presenting shipper support through witnesses representing the Bemidji Chamber of Commerce, the Beltrami County Council on Aging, and the Jackpot Junction Casino.

9. On July 8, 1991, during another prehearing conference telephone call, Brosh disclosed that the supporting shipper witnesses would be Rebecca Kuglin from Jackpot Junction Casino and David Schueppert, a Bemidji attorney.

10. The hearing began as scheduled at 1:00 p.m. on July 11. Annette Brosh, David Brosh, and Rebecca Kuglin were present, as was Gene Johnson and some (but not all) of the Protestants. Also present was Eldon E. Keehr, a member of the Transportation Regulation Board. After some preliminary matters were disposed of, including the granting of Petitions to Intervene previously filed by Riggles Transport and Triangle Transportation Co., Inc., testimony began with Kuglin.

11. Jackpot Junction Casino is located in Morton, Minnesota, about five miles from Redwood Falls. Kuglin works in the promotional department of Jackpot Junction. She deals with the motor coach program and the air program, as well as other promotional activities designed to draw people to the casino. The casino uses a system of independent representatives, known as "coordinators", to package tours to the casino. These coordinators are not fulltime employees of Jackpot Junction, and they generally package tours to a number of tourist destinations. Jackpot pays the coordinators on the basis of how many people they bring to the casino. These coordinators find the groups, or organize them, and hire the transportation for the tours. Jackpot Junction

and Ms. Kuglin do not hire buses themselves, even if a coordinator asks them to do so. Ms. Kuglin has no direct contact with bus companies. At most, she would refer a coordinator to one or more bus companies in the area of the tour, but that is done only if the coordinator asks. It is the coordinators who must contact the bus companies, and negotiate the rates and other terms of service for the trips.

12. Upon ascertaining the facts regarding Ms. Kuglin's limited role in arranging transportation, Protestants mov

13. After Ms. Kuglin testified regarding Petitioner's fitness and Jackpot Junction's satisfaction with Petitioner's past services, Annette Brosh took the stand. Based upon her testimony it is found that the University of Minnesota does solicit bids for charter bus service pursuant to a request for proposals. Ex. 1. In mid-1989, Brosh did submit a bid to supply charter bus service for the period July 1, 1989 through June 30, 1991. However, her bid was rejected because she did not have authority to provide intrastate transportation from the Twin Cities area. Ex. 2.

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14. At some unspecified time in early 1991, Brosh asked to be placed on the bid list at Bemidji State University. However, on April 18, 1991, the business manager at Bemidji State wrote to her, indicating that Bemidji State had been advised by the Minnesota Department of Transportation that Brosh Transportation was not authorized to provide bus service originating in Bemidji, and that, therefore, she could not be placed on the bid list. Ex. «3.

15. Brosh reasons that since these institutions do solicit bids, there must be a need for transportation services. As explained more fully in the Memorandum, neither of these institutions has demonstrated a need for Petitioner's transportation services from Beltrami County.

16. Mrs. Brosh also attempted to testify that she herself had received requests for motor coach service to the Twin Cities area from Beltrami County. An objection was lodged that her testimony would be hearsay with regard to statements made by other persons. Protestants also pointed out that there had been no disclosure in advance of the hearing (which had been requested) so as to allow Protestants to investigate the reliability of the statements. The Administrative Law Judge sustained the objection.

17. The only other evidence with regard to need was to have come from Mr. Schueppert, a Bemidji attorney. His schedule did not allow him to be at the

hearing on July«11, but he did plan to attend on July 12. After the testimony of Ms. Kuglin and Ms. Brosh, Protestants moved to dismiss the Petition on the grounds that there could be no finding of need, as Mr. Schueppert did not have adequate foundation to provide evidence of need. In support of the motion, Protestants' attorney played a tape recording of a telephone conversation between himself and Mr. Schueppert wherein Mr. Schueppert related that he, himself, had never attempted to arrange charter bus transportation from Beltrami County but that he had spoken with other people in the county (whom he would not identify) who thought there was a need for additional charter bus service. Mr. Brosh stated that Mr. Schueppert was bringing with him affidavits from persons in Beltrami County who believed that there was a need for additional charter bus service from the county. Protestants moved to dismiss the proceeding and deny the Petition for lack of a prima_facie case of need. Mr. Brosh indicated that he had no other supporting shipper witnesses with regard to need, but that he believed the rules governing the proceeding, in particular Minn. Rule pt. 1400.7300, subp. 1, allowed him to meet his burden by the evidence he had offered to elicit from Jackpot Junction, Annette Brosh and Mr. Schueppert. The Administrative Law Judge granted Protestants' Motion for the reasons set forth in the Memorandum below. The hearing then ended.

Based upon the foregoing Findings, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Transportation Regulation Board has jurisdiction over the subject matter of the hearing.
2. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter is properly before the Administrative Law Judge.
3. Petitioner failed to meet its burden to demonstrat

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THIS REPORT IS NOT AN ORDER AND NO AUTHORITY IS GRANTED HEREIN. THE TRANSPORTATION REGULATION BOARD WILL ISSUE ANY ORDER OF AUTHORITY WHICH MAY ADOPT OR DIFFER FROM THE FOLLOWING RECOMMENDATIONS.

Based upon the foregoing, the Administrative Law Judge respectfully recommends to the Board that it enter the following:

ORDER

The Petition of Annette Brosh, d/b/a Brosh Transportation, for an extension of charter carrier permit authority to transport passengers under charter from points located in Beltrami County to all points in Minnesota, and return, is hereby DENIED.

Dated this _18th_ day of July, 1991.

s/ Allan W. Klein

ALLAN W. KLEIN
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape Recorded, two tapes.

MEMORANDUM

I.

The central question to be answered in this case is whether or not a petitioner may meet its burden of proving need without any direct testimony from supporting shippers. In this case, Petitioner offered hearsay testimony and would have offered affidavits from persons who are available as witnesses, but were unwilling to attend the hearing.

The rule governing the admission of evidence in this proceeding is the rule of the Office of Administrative Hearings, Minn. Rule pt. 1400.7300, subp. 1, which provides as follows:

The judge may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable prudent persons are accustomed to rely in the conduct of their serious affairs. * * * Evidence which is incompetent, irrelevant, immaterial, or unduly repetitious shall be excluded.

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Other statutes or rules which must be considered, however, include Minn. Stat.

§ 14.60, subd. 3, which provides "Every party or agency shall have the right of

cross-examination of witnesses" and Minn. Rule pt. 1400.7100, subp. 1, which grants to all parties the right to cross-examine witnesses. Finally, consideration must be given to the residuum rule, which essentially provides that agencies may not base their decisions solely on hearsay or other incompetent evidence.

An administrative body acting quasi-judicially is not bound by strict procedural rules which circumscribe the action of a court and the reception of incompetent or inadmissible evidence does not necessarily void its determination. Morey_v._School_Board_of_Independent_School_District_No._492, 271 Minn. 445, 448-49, 136 N.W.2d 105, 107-08 (Minn. 1965). However, an administrative agency cannot, over objection, rest its findings of fact solely upon hearsay evidence which would be inadmissible in a judicial proceeding. State_ex_rel._Independent_School_Dist._No._276_v._Department_of_Education, 256 N.W.2d 619, 627 (Minn. 1977). There must be a "residuum" or residue of legally competent evidence that supports the agency's findings. This is particularly required for an essential issue such as public need. In the Brosh case, as outlined above, there was no competent evidence which could serve as the "residuum" for a finding of need. Thus, there was no point in going ahead with the hearing when the outcome was compelled by the lack of evidence on the need issue.

II.

With regard to the solicitation of bids by the University of Minnesota and Bemidji State University, the Administrative Law Judge concluded that they were not indicative of a need for P

A.W.K.